No. 12,153

IN THE

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY
(a corporation),

Appellant,

vs.

JOHN MARTIN SOUZA, LUCILLE JOSEPHINE SOUZA, JAMES LAWRENCE SOUZA, BENJAMIN SOUZA, minors, by and through their guardian ad litem, Josephine Souza, JOSEPHINE SOUZA, individually, and MARY ADELE SOUZA and GERALDINE SOUZA, LAWRENCE SOUZA and RICHARD SOUZA, minors, by and through their guardian ad litem, H. G. Eastman,

Appellees.

BRIEF FOR APPELLEES.

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Appellees.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This action involves three actions which were consolidated for convenience of trial. The appellee John Martin Souza filed an action to recover for personal injuries which he sustained when his automobile was struck by a train operated by the Southern Pacific

Company, a corporation, at the intersection of Beckwith Road and the main line track of the Southern Pacific Company extending between San Francisco and Los Angeles, the said crossing being located in Stanislaus County, California. The accident happened on the 11th day of October, 1945.

In the same accident Antonio Azevedo Souza and Edward Souza received injuries which resulted in their death. Two actions were filed to recover damages which were caused by reason of the two deaths. One was filed by Josephine Souza and the surviving children for the death of Antonio and one was filed by Geraldine Souza and the surviving children for the death of Edward.

These actions were originally filed in the Superior Court of the State of California, in and for the City and County of San Francisco, and were subsequently removed to the United States District Court where they were tried. The cases were tried before a jury and resulted in verdicts in favor of the appellees; the sum of one thousand one hundred fifty ($1150.00) dollars being awarded to appellee John Martin Souza, the sum of thirty one thousand forty-seven and 38/100 ($31,047.38) dollars being awarded to appellee Geraldine Souza and the sum of sixteen thousand one hundred seven and 38/100 ($16,107.38) dollars being awarded to the appellee Josephine Souza. Judgments were entered thereafter in accordance with the verdict of the jury.

Subsequently, appellant filed a motion for judgment notwithstanding the verdict and for a new trial. Both

of these motions, after hearing, were denied by the trial Court.

The appellant has listed five specifications of error. The first four of the specifications deal with questions of fact and can be grouped under one heading; namely "Was the Evidence Sufficient to Sustain the Verdict of the Jury?" Tied in with this issue is the question as to whether or not the evidence showed the appellee John Martin Souza guilty of contributory negligence as a matter of law. The fifth specification of error involves the alleged erroneous instruction of the jury.

Before proceeding to outline the facts, we feel that it is necessary to call the Court's attention to the often-cited rule, that when considering the evidence after a jury verdict, all conflicts and all contradictions are to be resolved in favor of the appellee and all reasonable inferences are to be drawn from the evidence in favor of the appellee. We feel it necessary to restate the facts, as appellant has evidently overlooked that law in its opening brief, which states the facts with conflicts and contradictions resolved in appellant's favor and inferences drawn in favor of appellant, all contrary to the law.

> "Turning first to the last mentioned contention it must be remembered that the jury was the sole judge of the credibility of witnesses and the weight of the evidence. Those matters are not within the province of an Appellate Court. It may be trite, but nonetheless pertinent to refer to the rule stated by this Court in *Crawford v. Southern Pacific Company,* 3 Cal. (2d) 427, 429 (45 P. (2d) 183):

" 'In reviewing the evidence on such an appeal all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict, if possible. It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the Appellate Court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deducted from the facts, the reviewing Court is without power to substitute its deductions for those of the trial Court.' "

Peri v. Los Angeles Junction Railway, 22 Cal. (2d) 111.

"It is elementary, however, that on appeal from a judgment of nonsuit the evidence shall be viewed in the light most favorable to plaintiff. * * * Application of this rule strikes down at once, and without necessity for further comment thereon, all those portions of defendant's argument which depend upon the resolution of conflicting inferences favorable to defendant."

Toschi v. Christian, 24 Cal. (2d) 354.

FACTS.

Viewing the facts in the light of the foregoing law, the evidence shows the following:

The accident out of which these three actions arose occurred at the intersection of Beckwith Road and the

Southern Pacific Main line track between San Francisco and Los Angeles. The date of the accident was October 11, 1945, and the time was approximately 9:10 A. M.

This intersection is approximately two miles north of the City of Modesto, Stanislaus County, California. Beckwith Road is a two lane macadam highway which extends in a general northeasterly and southwesterly direction and intersects the aforesaid main line Southern Pacific track at an angle of approximately 45°. The Southern Pacific track extends in a general northwesterly and southeasterly direction. Beckwith Road crosses the Southern Pacific main line track and joins U. S. California Highway 99, which is on the north side of the track and which parallels the Southern Pacific main line track.

Appellee John Martin Souza the night before the accident occurred had read an advertisement in the paper concerning a ranch which he thought he might be interested in for the purpose of stocking it with beef. (T. R. page 118.) He had been considering such an undertaking for about six months. (T. R. page 117.) On the morning after reading the advertisement, he started out to inspect the ranch that was advertised in the paper and he asked his father Antonio Azevedo Souza and his brother Edward Souza to go along to get their approval. (T. R. page 101.) Appellee John Martin Souza started for the ranch in a 1941 model Ford Coupe which he owned. (T. R. page 100.) Appellee John Martin Souza drove the automobile, his

brother Edward sat next to him and his father Antonio was furthest to the right. (T. R. page 100.)

They left home shortly before 9:00 A. M. (T. R. page 102) and the accident happened between 9:00 and 9:15 A. M.

As they approached the Southern Pacific main line track they were travelling in a northeasterly direction on Beckwith Road. (T. R. page 102.) The speed of the automobile as they drove along Beckwith Road was between thirty-five and forty miles an hour. (T.R. page 102.) When they came within 100 to 200 feet of the crossing where the accident happened, appellee John Martin Souza began slowing down his automobile (T. R. page 102) and when he was at a point approximately sixty feet from the track his estimated speed was fifteen miles per hour. (T. R. page 103.) He continued slowing the speed of his automobile and finally came to a complete stop with the front of his automobile approximately twenty feet from the tracks. (T. R. page 102.) After he had brought his automobile to a stop, he looked first to his right and then he looked to his left and in looking he saw no train approaching either from his right or from his left. (T. R. page 104.) He estimated that he spent approximately two seconds of time looking in each direction. (T. R. page 111.) During the time that he was stopped and looking in each direction for the approach of a train, he listened for a bell or whistle or some sound of the approach of a train. He did not hear the train nor did he hear a bell or a whistle. (T. R. pages 109, 110.) There was nothing wrong with his hearing and

the window was open on the driver's side of the automobile. (T. R. pages 109, 110.) After stopping, looking and listening for an estimated four seconds, appellee John Martin Souza shifted his automobile into low gear and started across the track at some three to four miles an hour. (T. R. page 111.) When he was on the track, he again looked to his right and saw for the first time the engine of the Southern Pacific Company which was then approximately fifty to seventy-five feet away (T. R. page 104) and the accident occurred immediately. (T. R. page 111.) Appellee John Martin Souza was familiar with this crossing as he drove over it approximately three times a week. (T. R. page 116.)

It was a cool morning and there was a mist or haze that limited the appellee John Martin Souza's vision to an estimated 200 yards or six hundred feet. (T. R. pages 104 and 144.) Because of this haze, appellee John Martin Souza did not have a clear view. (T. R. page 104.) This haze was ordinary for the time of year and limited visibility from two hundred feet to one thousand feet, depending upon what you were looking toward. (T. R. page 162.) The position of the sun as appellee John Martin Souza looked to his right had a tendency to distort his vision. (T. R. page 105.) The engine front was silver in color, making it difficult to see in the haze (T. R. page 428) and it was travelling at a speed of between sixty-five and seventy miles an hour. (T. R. page 425.) It was approaching the Beckwith Road crossing from the south. (T. R. page 424.) The engine whistle was not sounded for the

crossing as required by law, nor was the bell rung before the accident. (T. R. page 426.) The engineer, immediately before the accident, was holding a conversation with a brakeman who was riding in the cab of the locomotive (T. R. page 426) and after the accident he told the fireman, "You see what happens when you don't blow the whistle." (T. R. page 430.) Failure to blow the whistle and to ring the bell violated three of the Southern Pacific rules (T. R. page 210) and the law of the State of California. (T. R. pages 372, 373.)

THE BASIS OF APPELLEES' CASE.

These actions were tried upon the theory that the appellant carelessly and negligently operated its train across Beckwith Road without proper warning of its approach and in violation of the rules of the appellant company and the laws of the State of California. That under the conditions as they existed at the time, the driver of the automobile was in the exercise of ordinary care and caution as he proceeded on to the crossing after having stopped, looked and listened.

ARGUMENT.

(a) NEGLIGENCE OF THE SOUTHERN PACIFIC COMPANY.

There was ample evidence in the record to establish negligence upon the part of the Southern Pacific Railroad Company. The driver of the automobile, John Martin Souza, testified that he did not hear a bell or whistle even though he listened with his window open.

"Mr. Myers. Q. First, Mr. Souza, was the window on your side of the car open or was it closed?

A. It was open.

Q. How about the window on the other side of the car, was it open or closed; that is, the right hand side?

A. It was closed.

Q. Tell us whether you heard any bell ringing or whistle blowing immediately prior to the time the accident happened.

A. No, I did not hear anything."

(T. R. page 110.)

The fireman, who was on the side of the locomotive from which the automobile approached the track and whose duty it was to ring the bell on the engine, testified that he did not ring the bell, and neither did the engineer sound the whistle.

"Q. Now, when the engine was about 200 feet from the crossing, going at the speed that you have said it was going, can you tell us whether or not the whistle was blowing or the bell ringing at that time?

A. There was no whistle. He might have blowed the whistle after we hit the car, I don't know, don't recall. I was nervous.

Q. But up to the time of the collision——

A. No, there was no whistle.

Q. How about the bell, was any bell ringing?

A. Well, there might have been a bell afterwards, but I turned the valve on and the bell didn't ring. I saw the car—I thought the car was stopped, and it wasn't necessary to use the hand cord.

Q. For a distance of a quarter of a mile prior to reaching the intersection of Beckwith Road and the Southern Pacific right of way can you tell us whether or not in that distance the bell was ringing or the whistle blowing, either one?

A. No, it wasn't.

Q. What, if anything, was the engineer and this other person that was riding in the cab of the engine doing at the time of the happening of the accident?

A. Well, they were holding a conversation.

Q. Where was the engineer? I mean by that what was his position at the time?

A. Well, in order so that this brakeman could hear him he was facing the brakeman, which would be facing me. I am across from him."

(T. R. pages 425 and 426.)

This testimony was further corroborated by the statement made by the engineer immediately after the accident in which he called attention to "what happens when the whistle is not blown."

"Q. (by Mr. Myers). During the happening of the accident, or immediately thereafter, did the engineer make any comment at all as to the whistle blowing?

* * * * * * *

A. Yes. After we got stopped—I don't know whether he was talking to me or the brakeman—but he did say, 'You see what happens when you don't blow the whistle.' "

(T. R. pages 429, 430.)

The train was traveling at between sixty-five and seventy miles an hour according to Fireman H. J. Johnston.

"Q. How fast was the engine going at that particular time?

A. I would say between sixty-five and seventy miles an hour.

Q. For what distance had it been travelling at that speed of sixty-five to seventy miles an hour?

A. For a number of miles, I don't recall just how many, but a number of miles—after we left Modesto."

(T. R. page 425.)

The law is well established that failure to sound the warnings required by law establishes negligence.

"It is doubtless the law that failure to comply with the regulations prescribed by Section 486 of the Civil Code as to ringing the bell and blowing the whistle of a railroad train upon approaching a street crossing is prima facie evidence of negligence on the part of the railroad company (Parker v. Southern Pacific Company, 204 Cal. 609 (269 Pac. 622); Orcutt v. Pacific Coast Ry. Co., 85 Cal. 291 (24 Pac. 661)); and that where the evidence is conflicting as to whether the train crew complied with such statutory requirement, the implied finding of the jury adverse to the railroad company is binding on appeal. (Krause v. Rarity, 210 Cal. 644 (293 Pac. 62, 77 A.L.R. 1327); Pietrofitta v. Southern Pacific Co., 107 Cal. App. 575 (290 Pac. 597); Hoffman v. Southern Pacific Co., 215 Cal. 454 (11 P. (2d) 387).) Furthermore, the Courts have held that if a witness is in a position to hear the bell or the whistle of the locomotive and he testifies he heard neither, such testimony is sufficient to raise a conflict with

positive testimony to the contrary that such warnings were given. (Jones v. Southern Pacific Co., 74 C. A. 10 (239 P. 429); Lindsey v. Pacific Electric Ry. Co., 111 C. A. 482 (296 P. 131); Lahey v. Southern Pacific Co., 16 C. A. (2d) 652 (61 P. (2d) 461); Hamilton v. Pacific Electric Ry. Co., 12 Cal. (2d) 598 (86 P. (2d) 829); Thuet v. S. P. Co., 135 C. A. 527 (27 P. (2d) 910)."

Eastman v. A. T. & S. F. Ry. Co., 51 Cal. App. (2d) 653 at 660.

(b) APPELLEE JOHN MARTIN SOUZA WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

The principal argument of appellant is that the driver of the automobile, John Martin Souza, was guilty of negligence as a matter of law. There is no basis for such an argument. He did everything that an ordinarily prudent person would have done under the circumstances. He stopped his automobile before reaching the crossing and, while stopped, he looked and he listened and then he proceeded on across the track and the accident happened within a matter of a few seconds.

"Q. (of John Martin Souza). While you were at a standstill; in other words, while your car was stopped 20 feet from the tracks, I believe you said you looked to your right. About how long did you spend in looking to the right; just how much time elapsed while you were looking to the right?

A. About two seconds.

Q. I believe you stated you then looked to the left. About how much time elapsed while you looked to the left?

A. About another two seconds."

(T. R. page 111.)

"Q. When you stopped your automobile 20 feet from the crossing, will you tell us whether or not you listened?

A. Yes, I did.

Q. What, if anything, did you hear?

A. I didn't hear anything."

(T. R. page 109.)

The weather conditions as they existed at the time of the accident, although ordinary, limited and distorted appellee John Martin Souza's view of the track, particularly in the direction from which the train approached, as he had to look into the sun in that direction.

"Q. (of John Martin Souza). What kind of a morning was it, that is, with reference to climatic conditions, visibility and so forth?

A. Well, it was a cool morning. It was sort of a haze hanging low and I couldn't see any more than about 200 yards down the track, got no clear view.

Q. How about the sun, was it visible?

A. Yes, the sun was visible.

Q. Where was it with reference to you?

A. Well, it was directly, just about directly east of me, maybe a little south.

Q. A little south of east?

A. Right.

Q. How high in the sky was it, I mean with reference to your vision in the car?

A. It was at an angle.

Q. Were the rays showing directly upon the top of your car, or was it directly ahead of you?

A. It was shining in the windshield, I could see it.

Q. This haze that you speak of, was that a haze that was something like a fog, or was it something lighter than fog, or—well, describe it.

A. It was lighter than fog, being sort of a haze.

Q. Was your vision affected with reference to the direction you looked? What I mean by that, was there any difference in looking toward the sun or away from the sun?

A. Well, it naturally would distort my vision.

Q. Looking in what direction?

A. When I looked right directly on the sun.

Q. When you looked to the left, how about that?

A. The sun wouldn't hinder me when I looked to my left."

(T. R. pages 104, 105.)

"Q. When you looked to your right and you looked to the left, what if anything did you observe with reference to this mist or haze that you have described? In other words, I want to know how far down those tracks you had an unimpaired vision.

A. I would say I could see about 600 feet.

Q. And that would be in what direction? Just one direction or both directions?

A. Well, I could probably see a little more to the left as the sun would be in my eyes."

(T. R. pages 156, 157.)

Under these facts whether or not the driver of the automobile, John Martin Souza, was guilty of contributory negligence was purely a question of fact to be determined by the jury.

Under circumstances which are strikingly similar, it was held that the determination of negligence and contributory negligence were questions of fact for the jury. In *Chesapeake & Ohio Ry. Co. v. Waid,* 25 Fed. (2d) 366, the Court stated:

> "The question under all the circumstances was a proper one for the jury. The plaintiff stopped, looked and listened, if he told the truth, and whether he told the truth was for the jury. The question whether he exercised as much care in looking and listening as he should have done was also for the jury. The question whether, having stopped, looked and listened 145 feet from the crossing without seeing or hearing anything, ordinary care and prudence required him to stop again before going upon the tracks, and whether he could have been in the exercise of due care in looking and listening where he neither heard nor saw the train until he got upon the tracks, were questions of fact and circumstances for the jury."

This same case holds that where a person drives upon a railroad track and an accident happens within six or eight seconds from the time such person stopped and looked that such conduct does not establish con-

tributory negligence as a matter of law, but presents a question of fact for the jury.

> "He testified that he was travelling at the rate of six or eight miles an hour, and, as the District Judge has pointed out, this means that not more than six or eight seconds elapsed from the time when he looked at the corner of the terminal building and the time when he was struck. He might have seen the approaching cars if he had looked a second time in the direction from which they were coming before going on the track. But we think that he should not be held guilty of contributory negligence as a matter of law because he did not look twice in the same direction within six seconds."

> "The engine to his left demanded a share of his attention. The crossing itself demanded a share. Under such circumstances, is he to be held guilty of negligence as a matter of law because of his failure to see a danger which, if his evidence be believed, he looked for once only six seconds before he was struck, and failed to see because of defendant's negligent failure to display the lights and give the signals which every traveler along the highway had a right to expect? We think not."

Chesapeake & Ohio Ry. Co. v. Waid (supra).

It was further held in the same case that the jury is to determine whether or not ordinary care was used in looking and listening.

> "How intently and how constantly, or how often, after listening and looking in the exercise of the prudence of a reasonably careful man, depends upon all the circumstances; and one of the cir-

cumstances is the rightful expectation of the traveler that the railroad will perform the duty required by law and by ordinary care of warning him by sounding a locomotive bell or whistle on approaching a crossing. Whether a traveler on the highway has looked and listened as a man of ordinary prudence would is generally a question for the jury."

Chesapeake & Ohio Ry. Co. v. Waid (supra).

In crossing cases such as this, the question of contributory negligence is for the jury. The circumstances here are such that different conclusions can be reached from the facts as presented. In citing the language of the case of *Pokora v. Wabash Ry. Co.,* 292 U. S. 98, 54 S. Ct. 580, 78 L. Ed. 1149, 91 A.L.R. 1049, the Supreme Court of the State of California states:

"Too frequently appellate Courts have ignored those fundamental principles when dealing with railroad crossing accidents, and have arbitrarily substituted their conclusions of law as to the care a man of ordinary prudence would exercise under the circumstances presented to the trier of facts. The correct approach is expressed in Pokora v. Wabash Ry. Co., 292 U. S. 98, 105 (54 S. Ct. 580, 78 L. Ed. 1149, 91 A.L.R. 1049), involving a crossing accident, where contributory negligence is discussed:

" 'Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is more urgent when there is no background of experience out of which the standards have

> emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without. Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the common-place or normal. In default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury."
>
> *Peri v. L. A. Junction Ry.,* 22 C. (2d) 111.

Appellees concede and make no point of the fact that the law is well established that a traveler must look from a point where looking will be effective and listen likewise, and if he can neither see nor hear, he must stop. This is not new law. However, in those cases where the rule has been applied, the evidence conclusively established that the accident would not have occurred if either act had been reasonably observed. In this case appellees did stop, look and listen within twenty feet of the track. After stopping, looking and listening, he then proceeded on to the track at a speed of three to four miles an hour. Is thus required only five or six seconds to drive on the track in low gear. The inference from these facts is irresistible that appellee John Martin Souza was cautiously approaching the track. His view was distorted and limited because of the haze or mist. The silver color of the front of the engine made it blend with the mist and difficult to see. The train was making sixty-five or seventy miles an hour, which would make it travelling approximately ninety-seven feet a

second. Appellees had a right to expect that the Southern Pacific Company would give a signal as required by their rules and by the statutes of the State of California. John Martin Souza had no reason to assume that the train would be operated across Beckwith Road without the sounding of the whistle or bell being rung while he was exercising all the care and caution required of him. Appellee John Martin Souza, having stopped where he did and looked and listened under the circumstances appearing in the record, it is unreasonable to contend that as a matter of law he was guilty of contributory negligence for not stopping again at the track.

See:

Chespeake & Ohio Ry. Co. v. Waid, 25 Fed. (2d) 366.

The Supreme Court of the State of California has stated that it is a question for the jury to determine as to whether or not the driver of an automobile was negligent in choosing the position he might stop in for the purpose of making an observation of railroad tracks.

"But the plaintiff's choice of a position for observation is also a question for the jury."

Nelson v. Southern Pacific Company, 8 Cal. (2d) 648.

This same Opinion holds that it is a question for the jury to determine under all the circumstances as to whether or not failing to look a second time in the direction from which the train approached constituted negligence on the part of the automobile driver.

> "The presence of the train, on which there is much testimony and conflict with the plaintiffs, is a question for the jury as is also her conduct in failing to look again to her right, in the presence of what she considered to be a definite hazard on her left and in traversing a difficult crossing."
>
> *Nelson v. S. P. Co.* (supra).

Under the facts of this case, the driver John Martin Souza was crossing a main line track upon which trains operated in both directions so that danger could be anticipated from either side. In looking to his left the way that Beckwith Road crossed the track, it would be necessary for him to make almost a complete turn of his head and look over his shoulder. Also the roadway was but two lanes and there was some other traffic to be expected. Under these facts and with the swiftness with which the accident occurred following Appellee John Martin Souza's stopping, listening and looking, it is difficult to see how by sharp calculations of the time and speed it could be made out that he was guilty of contributory negligence as a matter of law. The California Supreme Court in *Nelson v. Southern Pacific Railroad Company* (supra) points out the error in such type of calculations.

> "The testimony as to the giving of the statutory warning by bell and whistle is in direct conflict. The plaintiff testified she heard neither, that she was intent upon the train and engine to her left and upon the roadway which was rough. She travelled about 30 feet after passing track 2 before reaching the point of collision with the train on track 4. By a series of close calculations, it is argued that the train was visible if ordinary care

had been used in making the initial observation and the plaintiff's positive statement that she did not see it must be disregarded. The sum of these calculations, based in part on an estimate of the speed of the train given by the engineer, brings the train within the range of the plaintiff's vision by a margin of less than two seconds. It is obvious that even a slight error in an estimate of speed and distances would produce a totally different result. Such estimates and calculations do not therefore appear to us to be a sound basis on which to declare inherently improbable the plaintiff's positive statement that no train was visible for a quater of a mile on a stretch of straight track."

In the case of *Hoffman v. Southern Pacific Company,* 101 Cal. App. 218, contributory negligence on the part of one attempting to cross a railroad track in a dense fog was held to be a question for the jury. In that case the automobile was not brought to a stop before going upon the tracks, the evidence being merely that as the driver approached the track he listened for the train and also looked. He neither heard the train, nor did he see it. Under such circumstances the Court stated the rule as to the determination of contributory negligence as follows:

"The test as to the existence of contributory negligence on the part of one who attempts to cross a railroad track ahead of an approaching train is the question as to whether under such circumstances a reasonably prudent person would have undertaken to do so. When the circumstances of a particular case are of such a nature that differ-

ent conclusions may reasonably be drawn as to the prudence of a person in attempting to cross a railroad track the question of contributory negligence becomes one for the determination of the jury. (Murray v. Southern Pac. Co., 177 Cal. 1 (169 Pac. 675); Whitney v. Northwestern Pac. Ry. Co., 39 Cal. App. 139 (178 Pac. 326); Firth v. Southern Pacific Co., 44 Cal. App. 511 (186 Pac. 815); 41 A. L. R. 420, 424, note; 22 R. C. L. 1034, Sec. 267; 3 Elliott on Railroads, 358, Sec. 1167.)"

The United States Supreme Court in the case of *Pokora v. Wabash Railway Co.* (supra) collects a great number of crossing cases and very carefully distinguishes and overrules a portion of the case of *Baltimore & Ohio Ry. Co. v. Goodman,* 275 U. S. 66, and holds that the question of contributory negligence of the driver of an automobile attempting to cross a railroad track is one primarily for the jury where a situation is presented that is not commonplace or normal.

The evidence, as pointed out, clearly shows that appellee John Martin Souza did exercise care by stopping, looking and listening. The evidence shows that some care has been exercised, it is always a question for the determination of the jury as to whether or not the care actually exercised was due and sufficient.

"In the Koch case (supra, 148 Cal. 677) the Court declared (page 680): 'Of course, in any case such as this, where it is shown that a plaintiff has exercised some care, the question of whether or not the care actually exercised was

due and sufficient will always be a matter for determination by the jury.' "

Toschi v. Christian, 24 Cal. (2d) 354.

From all the circumstances developed by the evidence in this case and the above law, it was clearly a question of fact to be determined by the jury whether or not appellant was guilty of negligence and whether or not appellee John Martin Souza was guilty of contributory negligence.

"Under the rule, too familiar to justify citing authorities, that a verdict cannot be instructed if there is any room for fair-minded men to doubt plaintiff's contributory negligence, the Court below was justified in submitting this question to the jury.

"See, also, B. & O. R. Co., v. Reeves (CCA 6th) 10 F. (2) 329, 330; Lehtohner v. N. Y., N. H., & H. R. Co. (C. C. A. 2d) 188 F. 59; and Penn. R. Co., v. Miller (C. C. A. 3d) 99 F. 529.

"In the light of these authorities we think that the question as to whether the plaintiff was guilty of contributory negligence was clearly a question for the jury. As said by Mr. Justice Lamar, it is only where the facts are such that all reasonable men must draw the same conclusion from them that the question becomes one for the Court. Here the defendant was clearly guilty of gross negligence which resulted in plaintiff's injury. Whether the plaintiff was guilty of contributory negligence was a question as to which reasonable men might differ and have differed. To direct a verdict against the plaintiff under such circum-

stances would be to deny him the right to a trial by jury which is guaranteed by the Constitution."
Chesapeake & O. Ry. Co. v. Waid, supra.

See, also:
Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 36 L. Ed. 485.

There being substantial evidence, as pointed out, upon which the jury based its verdict, and the questions presented by that testimony being questions of fact, the judgments entered upon the jury's verdict should not be disturbed by an Appellate Court.

(c) APPELLANT'S AUTHORITIES DISTINGUISHED.

An examination of the authorities relied upon by the appellant shows that the person driving upon a railroad track failed to stop or to look or to listen or else negligently chose a place to stop where his view was obstructed and failed to look after passing the obstruction. The principal case relied upon by appellant is the case of *B. & O. Ry. Co. v. Goodman,* 275 U. S. 66, 72 L. Ed. 167, 48 S. Ct. Rep. 24. That case is readily distinguished because the driver of the automobile in that case did not stop before driving upon the railroad tracks. The case of *Pokora v. Wabash Ry. Co.,* 292 U. S. 98, 54 S. C. 580, 78 L. Ed. 1149, 91 A. L. R. 1049, distinguishes and partially overrules the *Goodman* case.

In *Argo v. Southern Pacific Co.,* 39 C. A. (2d) 706, the driver of the automobile was killed, and the evi-

dence showed that he did not stop and look, nor did he listen for the approaching train. He drove directly onto the tracks at six miles an hour. Had he stopped to look he would have had a clear view for a mile.

Young v. Southern Pacific Co., 189 Cal. 746, presents a factual situation where the deceased operator of a motorcycle used no care at all. He failed to heed the warning of a stationary electric bell, and also the bell and whistle of the engine. A brakeman and a friend shouted at him, and yet he drove onto the tracks without stopping and looking.

The case of *Koster v. Southern Pacific Company,* 207 Cal. 753, has been modified by the later California cases, and is readily distinguished from the present factual situation the same as the foregoing cases. The driver did not stop before going upon the tracks and he could have at a safe distance where he would have had a view for 2000 feet. The morning was clear and the atmospheric conditions were good for visibility. The evidence showed the engine bell was ringing and the whistle was being sounded and the light was burning.

Again the same situation prevailed in *Shannon v. Northwestern Pacific R. Co.,* 209 Cal. 303. There the driver went on to the track without stopping. Had he stopped, he would have had a clear view for three hundred to four hundred feet, or had he looked, he could have seen the train.

In *California Rendering Co. v. Pacific Electric Ry. Co.,* 205 Cal. 73, upon which appellant relies heavily,

the evidence showed that the driver negligently stopped where his view was obstructed by trees and consequently his view was limited to three hundred feet. The trees were thirty-two feet from the track and had he exercised reasonable care and gone just a few feet past the trees to stop, look and listen, his view would have been unobstructed. Further, the wig-wag signal was in operation to warn of the train's approach.

The same circumstances were present in *Stephenson v. Northwestern Pacific R. Co.,* 208 Cal. 749; the driver carelessly stopped where his view was obstructed. Light conditions were pretty good, and after he passed the obstruction, had he looked, he could have seen in excess of four hundred feet.

The above authorities are the ones most relied upon by appellant. They deal with situations where a person about to cross a railroad track did not stop and look, or did not look or listen; and situations where the person negligently stopped and looked from a position where the view was obstructed and then carelessly failed to look again after passing the obstruction, where if he had, he would have had a clear view of the approaching train.

These conditions are not present here. John Martin Souza carefully stopped at a point where nothing obstructed his view. Had it not been for the haze or mist that prevailed the morning of the accident, plus his having to look through it into the run which distorted his view, the accident in all probability would not have happened. He stopped at a point where there

were no buildings or trees to obstruct his view, so it cannot be said that his view was limited because of the point where he chose to stop and look. Whether he stopped further ahead or back would have made no difference as far as his view was concerned because of the prevailing weather conditions and location of the sun. There is also the fact to be considered that the front of the engine was silver which made it blend with the haze or mist. To argue that it was silver to make it more visible is well and good under ordinary conditions; but, and this is not meant to be facetious, a golf ball is white for visibility, but certainly it would be hard to find or see in a snow bank.

(d) THE CONTRIBUTORY NEGLIGENCE OF THE DRIVER JOHN MARTIN SOUZA IS IMPUTED TO HIS FATHER AS A MATTER OF LAW IS A MOOT CONTROVERSY.

There is no question that the California law is that the negligence of a minor who operates a vehicle upon the highways of the State of California with the permission of the father, is to be imputed to the father. (Calif. Vehicle Code S. 353(6)).

Had the jury found negligence upon the part of John Martin Souza, which proximately contributed to the accident, that negligence would be imputed to the father Antonio Souza, deceased, as a matter of law. However, the jury by its verdict found that John Martin Souza, was not negligent, so there was no need at all for the jury to consider the question of the imputation of negligence to Antonio Souza, de-

ceased. Certainly, in no event could any alleged contributory negligence on the part of the driver, John Martin Souza, be imputed to decedent, Edward Anthony Souza, so as to effect the rights of his surviving widow, Geraldine Souza, and their surviving children. The whole question is moot because of the finding of the jury.

Further, appellant does not point out, where or how it was prejudiced by the Court instructing the jury in such a way as to permit them to find as a fact whether or not John Martin Souza was driving with the consent of his father, Antonio Souza.

The Court as a matter of law could have corrected any verdict.

(e) THE COURT CLEARLY INSTRUCTED THE JURY THAT APPELLEE JOHN MARTIN SOUZA HAD THE RIGHT TO ASSUME THAT APPELLANT WOULD OBEY THE LAW.

The appellees requested and the Court instructed the jury as follows:

> "You are instructed that a person in the exercise of ordinary care and caution, himself, in approaching a railroad track, has a right to anticipate until his faculties inform him to the contrary, that those in charge of a railroad train which might be approaching such crossing would exercise ordinary care and caution as required by law."

This instruction does no more than state the law as contained in Section 1963, Subdivision 33 of the Cali-

fornia Code of Civil Procedure. That section provides that there is a presumption that the law has been obeyed. The above instruction simply told the jury that if a person is exercising ordinary care, such person has the right to assume that those in charge of an engine would obey the law and he had a right to rely upon this assumption until he had notice to the contrary. This has long been the established rule.

> "The engine bell was not rung as required by Section 486 of the Civil Code. This must be assumed in this Court because there was testimony to that effect. Nor can it be presumed, as against the verdict, that the noise of plaintiff's wagon, as his horses were proceeding upon 'a slow trot', would have prevented his hearing the bell had the bell been ringing. Plaintiff had a right to rely upon the performance by those on the locomotive of every act imposed by law upon them when approaching the crossing."
>
> *Strong v. Sacramento & Placerville R. R. Co.* (1882), 61 Cal. 326.

The rule is clearly stated in California Jurisprudence where a great number of cases are collected.

> "One who is himself not negligent is entitled to rely upon the presumption that others will exercise due care, so that it is not negligence to fail to anticipate danger which can come only from a violation of law or duty upon the part of another."
>
> 19 *Cal. Juris.* 596, Sec. 35, Negligence.

This rule has been followed consistently throughout the decisions.

"The appellant further contends that even if it is shown that he was negligent, the evidence also shows that plaintiff was equally negligent in crossing the street as she did. The contention is without merit. 'The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person.' (29 Cyc. 516; Medlin v. Spazier, 23 C.A. 242 (137 P. 1078).) Such person must, of course, himself use reasonable care to observe the conduct of the other person so far as such conduct may affect his own conduct at the same time."

Harris v. Johnson, 174 Cal. 55.

The above rule was followed exactly in preparing the instruction complained of, as it first told the jury that the person relying upon the assumption that the law would be obeyed must be in the exercise of ordinary care and caution himself. Whether or not plaintiff was in the exercise of ordinary care and caution so that he could rely upon the assumption was a question of fact for the jury.

"The Court also instructed the jury: 'I instruct you that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise, it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person.'

"While this is also a general rule, it should have also been qualified under the circumstances of this particular case. The rule does not apply to 'every person' but applies to one who is himself not negligent. (19 Cal. Jur. 596 and cases there cited.) Reliance upon this presumption will not excuse one who is himself negligent, for such a rule would abrogate the doctrine of contributory negligence. (McPherson v. Walling, 58 Cal. App. 563 (209 Pac. 209).)

"A person may not blindly rely upon the unaided care of another, but must use reasonable care to observe the conduct of such other person, so far as this may affect his own safety. (Simonsen v. L. J. Christopher, 186 Cal. 786 (200 Pac. 615); Harris v. Johnson, 174 Cal. 55 (Ann. Cas. 1918E, 560, L.R.A. 1917C, 477, 161 Pac. 1155).) Whether or not reasonable care is used under the circumstances, in relying upon this presumption, is a question for the jury. (Mann v. Scott, 180 Cal. 550 (182 Pac. 281, 282); Scott v. San Bernardino Valley Co., 152 Cal. 604 (93 Pac. 677).)"

White v. Davis, 103 C.A. 531, at 545.

This rule was again followed in the case of *Dickinson v. Pacific Greyhound Lines,* 55 C.A. (2d) 824, where the Court states:

"The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person.

(Harris v. Johnson, (1916) 174 Cal. 55, 58 (161 P. 1155, Ann. Cas. 1918E, 560, L.R.A. 1917C, 477); Medlin v. Spazier, (1913) 23 Cal. App. 242, 245 (137 P. 1078), quoting from 29 Cyc. 516.) Whether reaasonable care is used under the circumstances in any particular case in relying upon the presumption is a question for the jury. (White v. Davis (1930) 103 Cal. App. 531, 545 (284 P. 1086).)"

Under the foregoing law it is clearly apparent that the instruction given by the Court to the jury was a correct statement of the law. It told the jury that when a person approaches a railroad crossing and exercises ordinary care and caution himself, that is, if he is not negligent himself, he has the right then to rely upon the presumption that those operating the train will obey the law, unless in the exercise of ordinary care, he is informed to the contrary.

See also

Chesapeake & Ohio Ry. Co. v. Waid (supra).

Appellee John Martin Souza testified that he stopped, looked and listened. This testimony was corroborated in effect by the testimony of the fireman on the engine, who testified as follows:

"Q. (of Mr. Johnson) Did you see the automobile before the accident happened?

A. Yes, I saw it as it came up to the tracks.

Q. As it came up to the tracks was it traveling on this road we have just talked about? We can stipulate it was Beckwith Road, can we not?

Mr. Dunne. That is right.

Mr. Myers. Q. It was on this particular crossing when you saw it, was it?

A. Yes.

Q. Was it on your side of the locomotive?

A. Yes.

Q. At that time your locomotive was northbound to the layman, but I suppose you railroad men would call it westbound?

A. Westbound.

Q. In other words, going towards San Francisco?

A. Going towards Sacramento.

Q. Where was this automobile with reference to the tracks that your engine was traveling on when you first saw it?

A. Well, I saw it pull up, but the car was going slow; it looked like it was stopped, and I thought it was going to stop but evidently it didn't, and the next time I noticed it, why, it looked like it was going to be in front of the locomotive, so, of course, by then we were right on top of it and I yelled for an emergency stop to the engineer, and it was too late.

Q. Now, at any time did you see that automobile at a stop? Did you see that automobile at any time at a stop?

A. Well, it was kind of hard to judge. It looked like it was stopped; it wasn't going very fast. I don't say it was going over between five and ten miles an hour, and of course we were going pretty fast and it is hard to judge.

Q. How far was it from the tracks when you saw it?

A. Well, I saw it pull up and, well—where the post is, where the warning post is, I would say it was around there, and it looked like it was stopped, but evidently was not.

Q. You say it looked like it was stopped?

A. Yes. I couldn't say for sure, but it wasn't going very fast, I know.

Q. How many feet would you say it was from the crossing?

A. Oh, I would say somewhere around 200 or 250.

Q. I mean the automobile, how many feet from the crossing was the automobile, would you say?

A. Oh, I would say around 15, 10 or 15 feet.

Q. All right, at that time where was the locomotive with reference to the line of travel of this automobile on Beckwith Road, how far away was it?

A. Somewhere around 200 feet."

(T.R. pages 423, 424 and 425.)

"Q. Now, when the engine was about 200 feet from the crossing, going at the speed that you have said that it was going, can you tell us whether or not the whistle was blowing or the bell ringing at that time?

A. There was no whistle. He might have blowed the whistle after we hit the car, I don't know, don't recall. I was nervous.

Q. But up to the time of the collision——

A. No, there was no whistle.

Q. How about the bell, was any bell ringing?

A. Well, there might have been a bell afterwards, but I turned the valve on and the bell didn't ring. I saw the car—I thought the car was stopped, and it wasn't necessary to use the hand cord."

(T.R. pages 425, 426.)

Under all of the evidence produced by appellees, it was clear that the jury could find that appellee John

Martin Souza was in the exercise of ordinary care and caution and was therefore entitled to rely upon the presumption that the persons in charge of the Southern Pacific Company engine would obey the law. In addition, the Court fully instructed as to the duties imposed upon John Martin Souza, the driver of the automobile. (T. R. page 380.) This instruction immediately follows the one complained of and fully sets out the duty of care and caution imposed upon a person about to cross a railroad track. Reading these two instructions together it is clear that the Court fully and accurately instructed the jury with reference to the relative rights of the driver of an automobile and the operator of an engine.

In connection with this assignment of error appellant has complained that there was error committed by the Court in its failure to give to the jury appellant's instruction No. 27. This instruction clearly violates the rule previously set out in that it does not state, first, that the persons in charge of the engine must themselves be in the exercise of ordinary care and caution before they can rely upon the presumption that others will obey the law in attempting to cross the railroad tracks in front of them. Furthermore, all of the other subjects contained in the refused instruction were covered by other instructions given by the Court. (T. R. pages 380, 381, 382 and 383.) It is submitted that the defense instruction No. 27 proposed by appellants was erroneously drawn and that the main subject matter of the said instruction was completely covered by instructions that were given to the jury by the trial Court.

(f) THE QUESTION OF JOINT VENTURE IS MOOT.

Appellant contends that the Court should have given its instruction No. 38, which would have permitted the jury to determine the question as to whether or not John Martin Souza, his brother and his father were engaged in a joint venture or enterprise. (Instruction No. 38. T. R. page 447.)

There was no evidence in the record from which the jury could find that the appellees were engaged in a joint enterprise. There was no evidence of a community of interest in the object of the undertaking, an equal right to direct and govern the conduct of each other, share in the losses, or divide profits. These are some of the necessary elements of a joint enterprise.

Larson v. Lewis-Simas-Jones Co., 29 C.A. (2d) 83, 84 P. (2d) 296;

Wiltsee v. Calif. Emp. Com., 69 C.A. (2d) 120, 156 P. (2d) 612.

Besides, the jury by its verdict found that the occupants of the automobile and the driver were without fault, and there was therefore no need for the jury to consider the question of joint enterprise, if it was proper.

The question consequently is moot.

(g) APPELLANT'S PROPOSED INSTRUCTIONS 56, 58 AND 58-A WERE PROPERLY REFUSED BY THE TRIAL COURT.

Appellant's instruction No. 56 (T. R. page 448) was covered fully by other instructions given by the Court. The following instruction covers most of the ground:

> "You are instructed that it is as much negligence to fail to see that which can be seen by the exercise of ordinary care, as it is negligence not to look at all."
>
> (T. R. page 375.) (See also Instruction T. R. pages 378 and 379.)

Whether or not John Martin Souza, or the occupants of the car should or could have seen the approaching train in the exercise of ordinary care under the prevailing atmospheric conditions and the location of the sun was a question to be determined by the jury. The view was distorted and limited looking into the sun. The engine front was silver in color and it was traveling at a high rate of speed. There was the ever-present danger of a train coming from the opposite direction.

Appellant's instruction No. 58 (T. R. page 449) is on the same subject and is covered by other instructions given by the Court. (T. R. pages 375, 378, 379.)

The trial Court's refusal to give appellant's instruction No. 58-A (T. R. page 449) was not erroneous. It was completely covered by the following two instructions that were given:

> "However, the driver and each of the passengers in the automobile was under a continuing duty

to exercise reasonable care for his own safety at all times."

(T.R. page 380.)

"A railroad locomotive which is in plain view operating along a railroad track and toward a highway crossing at grade is itself a warning of danger without any other sign or signal or warning and any person in an automobile approaching the crossing, whether driver or passenger, is under a duty to exercise reasonable care to observe and heed that warning, whether other warnings or signals are given or not."

(T. R. page 382.)

It is submitted that the Court fully and properly instructed the jury when all of the instructions are read as a whole.

It serves no purpose to single out an instruction here and there and complain because it was not given or that there was some technical omission. The law is firmly setled that the instructions are to be read as a whole and if they fully and fairly instruct the jury, there is no error of a prejudicial nature.

The langugae used in *Brown v. Luster,* 165 Fed. (2d) 181, is particularly applicable here. It is stated in that case:

"* * * In such a benign climate, an Appellate Court cannot use an apothecary's scale to determine the precise minimum of evidence that was necessary to support the jury's verdict. Nor should we scrutinize the judge's instructions with a microscope, to spy out technical peccadillos.

"Reading the record as a whole, we are satisfied that the Court below committed no reversible error, and that substantial justice has been done."

CONCLUSION.

Appellant has endeavored in his brief to present this case to this Court as though arguing to a jury. Appellant is endeavoring to have this Court pass upon the credibility of witnesses, resolve contradictions in its favor and draw inferences favorable to it. This, of course, is all contrary to established law. There is substantial evidence in this record as pointed out heretofore that the Southern Pacific Company was negligent in the operation of the engine involved in the accident in that it failed to sound its bell or whistle as required by law. This established a *prima facie* charge of negligence.

There is substantial evidence in the record, as shown by the testimony set out in this brief, that plaintiff stopped, looked and listened and that he exercised care and caution as he attempted to cross the railroad track.

Under the cirmumstances, where his vision was limited by the mist or haze and distorted by the position of the sun, the law as established by the Federal Courts and the law of the State of California holds that it is a question for the jury as to whether or not a person approaching a crossing under such conditions exercised ordinary care in selecting the

place to stop and look and in looking and in failing to look the second time in the direction from which the engine approached. Appellant overlooks the fact that John Martin Souza of necessity had to look also to his left as trains traveled in both directions on the track involved in this accident, and that also some attention had to be paid to the roadway upon which he was traveling for there was always the problem of highway traffic.

In view of all the testimony, the law, as heretofore pointed out, clearly holds that it was for the jury to determine the questions of negligence and contributory negligence.

We have pointed out wherein the authorities relied upon by appellant are not applicable under the circumstances here developed. Those cases dealing with situations where the driver negligently selected a place to look where his vision was obstructed and then failed to look again after leaving the point he negligently selected when he would have had a clear view had such person looked again, or cases where the person approaching the railroad track failed to look at all, failed to listen or failed to stop.

We have already pointed out that any question of contributory negligence on the part of the appellee John Martin Souza which might be imputed to the father, Antonio Azevedo Souza, became moot upon the jury's finding a verdict in favor of the appellee John Martin Souza. That question being moot, certainly there is no contributory negligence to be im-

puted to the father, Antonio Azevedo Souza, and in no event could any negligence on the part of appellee John Martin Souza be imputed to the decedent, Edward Anthony Souza, so as to affect the rights of his surviving widow Geraldine Souza, and their minor children, as he was a passenger in the car, exercising no control over its management or operation and was not a party to a joint venture. These contentions have been completely nullified by the evidence and the law.

It is respectfully submitted that the issues of this case were submitted to the jury under proper instructions and in accordance with well established law and that said judgment should therefore be affirmed.

Dated, Oakland, California,
August 30, 1949.

Respectfully submited,
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